

	FOI UK	FOI Scotland
<b>Appointment of Commissioner</b>	Commissioner appointed by Queen on nomination of Government (s.6 of Data Protection Act 1998).	Commissioner appointed by Queen on nomination of Parliament (s.42(1)).
<b>Information Tribunal</b>	<p>Act provides for both an Information Commissioner and an Information Tribunal. Tribunal was not mentioned at White Paper stage but introduced by Bill.</p> <p>Authority/applicant can appeal to the Tribunal against decision of Commissioner (s.57) whether decision, information or enforcement notice.</p> <p>s.58 provides two grounds on which Tribunal can allow appeal: a) notice not in accordance with law; b) if it considers that Commissioner ought to have exercised discretion differently. Tribunal may review any finding of fact on which the notice is based.</p> <p>Further appeal possible to High Court on point of law.</p>	<p>Act provides only for an Information Commissioner. Scotland rejected need for Tribunal as introducing unnecessary extra appellate tier.</p> <p>Authority and applicant can appeal to Court of Session against decision, information or enforcement notice issued by the Commissioner on point of law.</p>
<b>Commissioner settlement</b>	No provision for settlement engineered by Commissioner contained in the Act.	Act provides for Commissioner to attempt to effect a settlement before reaching decision (s.49(4)). This emulates power of both Australian and Canadian Commissioners.
<b>Potential to override Commissioner</b>	<p>A Minister of the Crown or the Attorney General can issue a certificate in relation to exempt information.</p> <p>"Accountable person has formed opinion that on reasonable grounds PA has not failed to comply" (s.53). "Accountable person" high up the chain, eg First Secretary of Welsh Assembly or Minister of the Crown.</p> <p>Certificate can only be issued in relation to notice served on government dept or public authority designated by Order.</p>	<p>Scottish Executive can only issue certificate in relation to certain exemptions: ss.29, 31(1), 32(1)(b), 34, 36(1) and 41(b) (almost all class exemptions). Also information must be of exceptional sensitivity (s.52). This second condition was added at Stage 2; a return to "An Open Scotland" promise.</p> <p>Only First Minister can give Commissioner the certificate and following consultation with other members of the Scottish Executive.</p> <p>Certificate can only be issued in relation to notice served on Scottish Administration (ie ministers, junior ministers, non-ministerial office holders and their staff).</p>
<b>Exercise of rights of children</b>	<p>Unlike Scottish law, capacity of children under 16 is largely governed by common law.</p> <p>Guidance from the Information Commissioner in relation to the Data Protection Act makes it clear that there is no minimum age requirement for applicants.</p> <p>Children can apply for their own records provided they are capable of understanding the nature of the request. A parent or guardian can only apply on the child's behalf if (a) the child has given consent or (b) the child is too young to have the understanding to make an application.</p> <p>Reference to "any person" in FOI UK would seem to imply children with sufficient understanding can apply.</p>	<p>s.69 Scottish Act expressly entitles children to exercise their rights under the Act. This was a late amendment introduced at Stage 3.</p> <p>A similar provision (s.66) exists in relation to Scotland only in the Data Protection Act.</p> <p>These two provisions follow wording of Age of Legal Capacity (Scotland) Act 1991; children can consent to certain activities (medical treatment/instructing solicitor) if have sufficient understanding. Presumed to have sufficient understanding if 12 or over.</p>

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# GUIDANCE 03

2005

## FREEDOM OF INFORMATION ACT: UK AND SCOTLAND COMPARISONS



The Freedom of Information (FOI) Act 2000 and Freedom of Information (Scotland) Act 2002 came into force on 1 January 2005 and will ensure that any person requesting information from a public body in the UK will receive that information, subject to certain exemptions. The Act encourages public authorities to be more open and accountable, and to organise their information in an efficient and accessible way. Although very similar in nature and in

substance there are, however, several differences between the two pieces of legislation.

	FOI UK	FOI Scotland
<b>Jurisdiction of Commissioner</b>	Commissioner responsible for both FOI (except Scotland) and Data Protection (whole UK). But note responsibility for FOI extends to UK-wide public authorities.	Commissioner responsible for FOI in Scotland. But see overlap with Data Protection (s.38).
<b>Duty to inform applicant that Public Authority (PA) has info requested</b>	<p>UK Act provides for dual right:</p> <ul style="list-style-type: none"> <li>to be informed that PA has information</li> <li>and if so, to have that information communicated.</li> </ul> <p>The UK Act refers to first right as "duty to confirm or deny" (s.1(6)). Duty referred to throughout the Act.</p> <p>Arguable that goes further than Scottish Act; UK Act envisages that the "duty to confirm" can be set aside for virtually every exemption (subject to public interest).</p>	<p>Scottish Act does not structure duty of authority in this way. Provides for one right: to be given the information requested.</p> <p>But does address issue via s.18. The duty to confirm whether info exists or not is subject to public interest test.</p> <p>Slightly narrower than UK Act in that only applies to certain exemptions (ss.28-35, 39(1) or 41).</p> <p>Commentators consider that the variation in drafting will have only marginal affect on outcome.</p>
<b>Destruction of information</b>	Destruction of material in sense of Scottish Act not specifically addressed in UK Act. But note that s.77 makes it an offence to alter, deface, block, erase, destroy or conceal info with intention of preventing disclosure by authority.	<p>Specific section (s.1(5)) prevents destruction of documents unless "not reasonably practicable". Clear from Justice Minister's comments that relates to info "already on a lorry... trundling towards the incinerator" (Stage 3 debate).</p> <p>See also s.65 making it an offence to destroy material with intention of preventing disclosure. Maximum fine currently £5000.</p>

	FOI UK	FOI Scotland
<b>Harm test</b>	Authorities must show disclosure would “prejudice” specified interest. White Paper proposed a “substantial harm” test but not reflected in subsequent bill. Home Secretary said that harm should be “real, actual or of substance”.	Authorities must show disclosure would “substantially prejudice” specified interest. Higher standard than UK.
<b>Public interest test</b>	Question framed as: “Does the public interest in maintaining the exemption outweigh the public interest in disclosing information?” (s.2(1)(b)). In House of Lords Report Stage, amended this clause in Bill to ensure that where disclosure or non-disclosure evenly balanced, scales would come down on side of disclosure.	Question framed as: “Is the public interest in disclosing the information requested outweighed by the public interest in maintaining exemption?” (s.2(1)(b)). Commentators consider that verbal reversal has little significance (see MacDonald, J.; Jones, C <i>The Law of Freedom of Information</i> (2003), Oxford University Press, p672, para 22.32). Justice Minister stated at Stage 2 debate “information can be withheld only when the public interest in withholding it is greater than the public interest in disclosing it”.
<b>Information received from UK Government “in confidence”</b>	No reciprocal arrangement in relation to information from Scotland.	s.3(2)(a)(ii) provides that information supplied by Minister or Department of UK Government and held “in confidence” is not “held” by Scottish authority and therefore cannot be accessed under Scottish Act. In such cases UK FOI Act will be used.
<b>Disability rights</b>	No specific mention of rights of disabled in relation to applying or receiving information requested.	Specific sections regarding disability rights (ss.8, 11(5)). Explicit reference to Disability Discrimination Act 1995. Introduced following demands from MSPs at Stage 2 debate. Amendments laid Stage 3.
<b>Pursuance of a campaign</b>	s.12(4)(b) refers to applications that are “in concert or in pursuance of a campaign”. In such cases, authority may be exempt from supplying information on basis that total costs involved exceed “appropriate limit”.	s.12(2)(b) refers to “purpose other than for obtaining information” following objections to use of term “campaign”. Accepted by Scottish Executive that term did not necessarily represent intention. Amended at Stage 3.
<b>Refusal of request on public interest</b>	s.17(2) allows public authority more time where authority has not reached decision on the application of s.2(1)(a) or (2)(b) (whether the public interest in relation to “duty to confirm or deny” or in relation to exempt information applies). Authority can issue applicant a notice estimating time within which decision will be reached. Section refers to “reasonable time”. Note s.45 Code of Practice states that PA should still aim to reach decision within 20 days (see Guide to the Freedom of Information Act 2000).	s.16 of Scottish Act cross-refers to s.10 and therefore imposes strict time limits on authority (20 days or 30 days where info transferred to Keeper of Records) even where public interest needs to be considered.
<b>Information not held by PA</b>	UK Act does not specifically address responsibility of authority when does not have info requested.	This issue is specifically addressed in s.17. Formal notice must be issued to say that info not held.
<b>PA review of refusal to disclose</b>	No provision in Act for internal review by authority. In its notice of refusal to disclose info requested the authority is enjoined to provide info about any internal complaints procedure the authority might have or state that does not have system. Must also refer to right of appeal to Commissioner (s.17(7)). But see s.50(2) which states that Commissioner can refuse to entertain application when applicant has not exhausted all remedies. The need for authority complaints system is mentioned in s.45 Code of Practice. But no time limit.	Scottish authorities have 20 working days (30 days if information held by Keeper and another PA has to carry out review) (s.21) to review their decision if they receive a requirement for review of refusal.

	FOI UK	FOI Scotland
<b>Publication schemes</b>	The UK Act does not specify the type of information that authorities should consider providing access to via its publication scheme (s.19(3)) but simply refers to need to have regard to public interest.	When adopting publication scheme, an authority must have regard to public interest in allowing access to info relating to costs, standards, facts or analyses. See s.23(3)(a).
<b>National Security Certificates – system of appeal</b>	s.60 provides for an appeal by Commissioner or applicant against a certificate issued under ss.23 or 24 (relating to information supplied by security services and national security respectively). Under s.23 (where information is absolutely exempt) Tribunal possesses power to quash a certificate where finds that information is not exempt. Final point of Appeal. Under s.24 (where information is subject to public interest test), the Tribunal can apply principles by court on application for judicial review. See Data Protection Tribunal Rules (National Security Appeals) Rules 2000.	Appeals from national security certificates (issued under s.31) not addressed in Scottish Act. According to policy paper accompanying Bill an order will be drafted to address national security certificate appeal system. Proposed that should be considered by special national security panel of Information Tribunal. As it stands, Commissioner cannot challenge on public interest if certificate is conclusive of that fact. Certificate could be challenged via judicial review.
<b>Information intended for future publication</b>	s.22 refers to information to be published at “some future date (whether determined or not)”.	s.27 specifies future date “not later than twelve weeks” from request.
<b>Research</b>	No specific section addressing research.	Detailed provision in relation to programme of research (s.27(2)). Sub-section added at Stage 2 following campaign by Scottish Universities. This provision emulates Irish Act.
<b>Parliamentary Privilege</b>	Information that falls under Parliamentary Privilege can be exempt. Certificate can be provided to that effect (s.34). The Commissioner cannot challenge the application of this exemption where it is supported by appropriate certificate. However, if no certificate is provided, the claim to this exemption can be challenged by the Commissioner.	The Scottish Act contains no corresponding provision. There is no concept of Parliamentary Privilege in relation to the Scottish Parliament or its members in the sense understood by Westminster. Scotland Act 1998 has number of provisions designed to give protection to Parliament so that it can conduct its business.
<b>Prejudice to public affairs</b>	Under s.36 it is left to “the reasonable opinion of a qualified person...” to decide whether disclosure of the information would prejudice the “effective conduct of public affairs”. Therefore applying a subjective test. Qualification only removed in relation to statistical information. Exemption becomes absolute in relation to info either House of Parliament.	Opinion of individual is irrelevant in Scottish Act (s.30). Applies an objective test.
<b>Legal professional privilege</b>	Section titled “legal professional privilege” (s.42). Exemption only applies to lawyer/client relations in England and Wales. Same section refers to situation in Scotland and uses phrase “confidentiality of communications” (emulated in Scottish Act). Therefore wider when dealing with Scottish public authorities covered by UK Act than other authorities.	Equivalent Scottish section (s.36(1)) refers to “confidentiality of communications” in legal proceedings under “Confidentiality” title. According to Justice Minister at Stage 2, this is broader and could include doctor/patient, journalist/source and possibly priest/penitent.
<b>Commissioner review: time limit</b>	UK Act provides no statutory time limit to review by Commissioner (see s.50).	Commissioner must report to Parliament annually on number of decisions made outside four month period (s.46(2)).
<b>Power to review: Lord Advocate/Procurators Fiscal</b>	Equivalent law officers in UK do not have protection accorded to Scottish law officers.	Commissioner has no power to review refusals to disclose by Lord Advocate and procurators fiscal (s.48) in relation to role as head of criminal investigations. Policy paper quoted s.48 of Scotland Act 1998 as justification for this provision, to protect the independence of the Lord Advocate in this role.